THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

THE SECOND ANNUAL Conference on Natural Law, under the auspices of The Guild of Catholic Lawyers was held at the House of the Association on December 4. The subject of the conference was "The Natural Law and the Family." At the opening of the conference Porter R. Chandler presented to the Association on behalf of the Guild a reproduction of Holbein's portrait of Sir Thomas More. In accepting the gift the President said:

It is a pleasure to welcome you here and to offer the hospitality of our halls to your annual meeting and discussions.

The Constitution of this Association provides, among other things, that it is established "for the purpose of cultivating the science of jurisprudence." It is thus indeed fitting that these halls should be thrown open to the philosophical discussion of the fundamentals of our system of law as well as to the practical application of that system to the problems of every-day life.

The subject of "The Natural Law," which I understand to be the topic of your discussion today, is certainly not alien to the great principles which inspired the founding fathers of this nation at the time of its birth. We have only to recall the words of the Declaration of Independence that men "are endowed by their Creator with certain inalienable rights. That among these are life, liberty and the pursuit of happiness." We have only to remember George Washington's words in his farewell address that "we ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right, which Heaven itself has ordained." Mankind never tires of the quest for absolute

justice. The desire for justice is part of man's being and the search for it and its origin forms a large part of mankind's history.

The greatest sanction which any system of law can have is the moral and spiritual sense of those who are governed by it. No legal system can work unless the people themselves are imbued with a true moral sense. It is because the members of our society who subscribe to your faith are so deeply imbued with a sense of spiritual and moral responsibility that you form such a valued element in any community devoted to the preservation of a peaceful society.

I have been given to understand that you are most graciously about to present to this Association a portrait of a great Englishman, Sir Thomas More. As you all well know, perhaps the best known among Sir Thomas More's writings is his "Utopia" which he wrote originally in Latin but which has subsequently been translated into several languages. This is an account of an imaginary commonwealth in the island of Utopia pretended to have been discovered by a companion of Americus Vespucius from whom More learns the tale. In this perfect society, all are contented with the *necessaries* of life, all engaged in useful labor for six hours a day, and indolence, avarice and want are unknown. And one of the oldest laws of the Utopians is stated to be that no man should be punished for his religion, "it being a fundamental opinion among them that a man cannot make himself believe anything he pleases." How far the various doctrines and projects contained in the Utopia were regarded by More with approbation or were merely the paradoxes of a playful mind cannot be determined.

Certainly the strength and stability of the society which we have attained in this country is largely due to the fact that we have developed a system of law to which, for the most part, those of the many religious faiths which go to make up our community can subscribe and which itself tolerates and, indeed, nourishes all religious faiths. Because the moral and spiritual sense of our people is the greatest support of our system of law, it is surely important that we should see to it that our laws continue to conform to the moral sense of all our people. Unfortunately there have been times in our land when this principle has been disregarded, dating from the days of the blue laws of our Pilgrim fathers to the 1920s with the Eighteenth Amendment and the Volstead Act.

But I am sure that the real cause of the ecstatic society and state of bliss in which Sir Thomas More's Utopians lived was the following, and I quote from Sir Thomas More's own language. He says:

> "Furthermore they (the Utopians) utterlie exclude and banishe all attorneis, proctours, and sergeauntes at the lawe; whiche craftelye handell matters, and subtelly dispute of the lawes. For they thinke it moste meete, that every man should pleade his own matter, and tel the same tale before the judge that he wold tell to his man of law. So shal there be lesse circumstaunce of wordes, and the trueth shal soner come to light, whiles the judge with a discrete judgement doethe waye the woordes of him whom no lawyer hath instructe with deceit,

and whiles he helpeth and beareth out simple wittes against the false and malicious circumventions of craftie children."

Sir Thomas More had other qualities which must have been equally unpalatable to the lawyers of his day. They are epitomized in the following happy rhyme:

"When More some time had Chancellor been
No more suits did remain.
The like will never more been seen
Till More be there again."

THE FINAL ROUNDS of the Fifth Annual National Moot Court Competition, sponsored by the Young Lawyers Committee, Harman Hawkins, Chairman, were held at the House of the Association on December 16 and 17, 1954. The law schools competing in the final rounds had been successful in the regional rounds of arguments held in more than eighty law schools throughout the United States. The participating schools were Boston University School of Law, Columbia University School of Law, Emory University-Lamar School of Law, Georgetown University Law School, Loyola University of Los Angeles School of Law, Southern Methodist University School of Law, University of Buffalo School of Law, University of Chicago Law School, University of Colorado School of Law, University of Florida College of Law, University of Illinois College of Law, University of Kentucky College of Law, University of Michigan Law School, University of Pittsburgh School of Law, University of South Carolina School of Law, University of Texas School of Law, Villanova University School of Law, Washington & Lee University School of Law, Washington University School of Law, Western Reserve University School of Law and Willamette University College of Law.

The two teams reaching the finals were those from Columbia and Illinois. Columbia was represented by Richard E. Leavitt, J. Daniel Mahoney and David T. McGovern. Illinois was represented by Jack W. Leskera and Willard L. Shonfeld.

Columbia was designated the winner of the competition and

was awarded the right to possession of a silver cup named for Chief Judge John C. Knox of the United States District Court for the Southern District of New York, and a prize of Five Hundred Dollars named for Major General William J. Donovan, wartime head of the Office of Strategic Services. The University of Colorado team was judged to have submitted the best brief, entitling its school to possession of a silver bowl named for Harrison Tweed. David T. McGovern of Columbia won the award for the best individual oral argument.

The court for the final argument consisted of The Honorable Felix Frankfurter, Justice of the Supreme Court of the United States, The Honorable Edmund H. Lewis, Chief Judge of the New York State Court of Appeals, The Honorable Ernest A. Inglis, Chief Justice of the Connecticut Supreme Court of Errors, The Honorable Charles D. Breitel, Justice of the Appellate Division, First Department, William H. Davis, Chairman of the Atomic Energy Labor Relations Panel, Thomas K. Finletter, Former Secretary of the Air Force, and the President of the Association.

AT THE suggestion of the United States Attorney, The Honorable J. Edward Lumbard, Jr., the Committee on Courts of Superior Jurisdiction, Stuart N. Updike, Chairman, has made arrangements for the opening on the main floor of the Federal Court House of a room for the use by lawyers practicing in the Federal Courts. Judge Lumbard was the guest of the Committee at its December meeting.

In November The Honorable James B. M. McNally was the guest of the Committee and discussed calendar practice in New York County.

THE ADVISORY Committee on the Expert Medical Testimony Project, of which Presiding Justice David W. Peck is Chairman, held a meeting at the House of the Association in December to consider the final draft of the report on impartial medical testi-

mony. It is expected the report will be released for publication in the near future.

AT THE Stated Meeting on December 14, The Honorable Shneour Zalman Cheshin, Deputy President of the Supreme Court of Israel, spoke on the subject "Justice in a New State." An adaptation of Judge Cheshin's lecture is published in this number of THE RECORD.

THE COMMITTEE on Medical Jurisprudence, Julius Isaacs, Chairman, had as its guest in December Lt. Ellsworth Monahan of the New York Police Department. Lt. Monahan and the Committee discussed the problem of juvenile narcotic addicts.

A PUBLIC CONFERENCE on municipal court calendar practice, sponsored by President Justice Daniel Gutman of the Municipal Court, was held at the House of the Association in December. The conference was arranged in cooperation with the Committee on the Municipal Court of which Charles J. Colgan is Chairman.

THE SECTION on Administrative Law and Procedure, of which Chester T. Lane is Chairman, sponsored a discussion of some practical aspects of the relationship between the SEC as an administrative agency of the federal goverment and the legislative branch, the judicial branch, and the securities industry and the Bar. The speakers were J. Sinclair Armstrong, Commissioner, Securities & Exchange Commission, and William H. Timbers, General Counsel, Securities & Exchange Commission.

THE EXECUTIVE Committee has authorized the Librarian of the Association to start a collection of photographs of members. It is thought that the collection will have an historical interest and

furthermore, the Librarian is often asked to supply pictures of members. Photographs should be sent to Sidney B. Hill, Librarian. There is no requirement as to size or mounting and the pictures do not need to be works of art.

THE ASSOCIATION of American Law Schools held its Annual Meeting in New York City December 28–30. Over 800 representatives of law schools were present and the Association entertained the delegates at a cocktail party at the House of the Association in cooperation with the law schools in the New York area.

OTTO C. SOMMERICH has supplied THE RECORD with the following translation of an article published in the Information Letter of the International Commission of Free Jurists:

About 200,000 Middle-Germans travel into the Federal Republic every month, in order to resume contact with relatives, friends and acquaintances, which had been interrupted for years, and to gather information "how matters look" on the other side.

Many return home enthusiastic, some, however, disappointed. All of them, it is true, agree not only that the standard of life in the Federal Republic is substantially higher, but also—and that is the main thing—that the inhabitants of the Federal Republic are able to breath "free air," that they are living in a legal state, that no citizen is exposed to the arbitrary actions of the Government, and that no citizen need fear losing life, liberty or property.

The disappointed ones are those who did not encounter understanding for their worries and need, when they visited the West. They cannot understand that people do not "want to hear anything about politics," while the everyday routine shows to every citizen of Middle-Germany how deeply his personal life is influenced by politics. He cannot conceive that some citizens of the Federal Republic consider certain alleged or factual little injustices "as equally bad" as the systematic wrong committed in the Soviet Zone, and that many of them overestimate their commonplace worries to such extent that they do not listen to the terrible misery beyond the Elbe River. Many a bitter word can be heard: that the Federal Republic should, at least for some months, feel the impact of the Soviet occupation and Communistic coercive measures, in order to get aroused finally. Of course, nobody wishes earnestly such things, because experience has taught that it would be then too late.

Although this reaction of some disappointed persons is understandable,

no hasty conclusions should be drawn therefrom. It is true that some lack of understanding exists, and that enlightenment is necessary. But who should better be called upon to do that than the very inhabitants of the Eastern Zone? In some instances good will is not lacking within the more fortunate part of Germany. The Communists are a hopeless minority and everywhere the Pankow regime is repudiated. But a correct understanding of the events is only possible for those who know the details. How much pain hunger creates, only those persons can judge who had to suffer it. How bad it is to live without justice and liberty, people can hardly comprehend for whom life in justice and liberty is a matter of course. Therefore, there should be also some appreciation of the mentality of the Western Germans, they should be enlightened in a quiet manner, and one should not take for granted that they intend to "write off" the Soviet Zone.

An All-German popular movement is lacking whose standard bearers should be active citizens really rooted in the people, as, for example, community representatives, board members of local professional and trade organizations and business advisers. The creation of a Committee will not be sufficient. There are millions of citizens of the Federal Republic who are really worried about the fate of their relatives and friends in Middle-Germany. May it not be possible to mobilize these forces?

Out of these facts a task grows for the travellers from the Soviet Zone by which they will be able to support the efforts of responsibility-conscious political forces of the Federal Republic in their own interest. If the interzonal travellers consider themselves not merely vacationers, but rather ambassadors from their homeland, also the people who were uninterested so far will be roused and will grasp that there exists, not a problem of the Soviet Zone, but one of All-Germany which concerns the people in both parts of our Fatherland in like manner.

THE MEMBERS of the Special Committee on the Improvement of Family Law, Richard H. Wels, Chairman, were the guests of Commissioner of Correction Anna M. Kross at the City Prison in December. The Committee made a tour of the prison.

AN ARTICLE by Morris L. Ernst entitled "Tell Me, Mr. Attorney" will appear in the January issue of Harper's Magazine. Mr. Ernst, who writes somewhat tongue in cheek, recounts his experiences with people who use cocktail parties and other social functions as a means of obtaining free legal advice. Having discussed thoroughly the foibles of those who aim to get some-

thing for nothing, Mr. Ernst concludes that he would prefer to be approached by someone with an ulterior motive than not to be asked for advice at all.

THE COMMITTEE on Federal Legislation, Arthur L. Newman, Chairman, is studying the proposed new conflict of interest statutes, as well as preparing a revision of the Committee's report on the Bricker amendment.

The Calendar of the Association for January and February

(As of December 29, 1954)

January	3	Dinner Meeting of Committee on Professional Ethics Dinner Meeting of Committee on Law Reform
January	4	Dinner Meeting of Committee on Taxation Meeting of Section on Taxation
January	5	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates Dinner Meeting of Committee on Legal Aid, 6:00 P.M. Harvard Club
January	6	*Annual Twelfth Night Party.* Sponsorship Entertainment Committee
January	10	Dinner Meeting of Committee on Federal Legislation Dinner Meeting of Committee on Real Property Law
January	11	Dinner Meeting of Committee on Insurance Law Meeting of Section on Jurisprudence and Comparative Law Dinner Meeting of Young Lawyers Committee
January	12	Dinner Meeting of Committee on Courts of Superior Jurisdiction Dinner Meeting of Committee on Domestic Relations Court Dinner Meeting of Committee on Courts of Military Justice Meeting of Section on Trade Regulation Dinner Meeting of Committee on Trade Regulation and Trade Marks
January	13	Lecture by Erwin N. Griswold, Dean, Harvard Law School. 8:00 P.M. *Buffet Supper, 6:15 P.M.*

January	17	Joint Meeting of Section on Corporate Law Departments and Section on Trade Regulation Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations Meeting of Library Committee
January	18	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
January	19	Meeting of Committee on Admissions Meeting of Committee on Arbitration Dinner Meeting of Committee on Bill of Rights Meeting of Section on Corporations Dinner Meeting of Committee on Foreign Law *Round Table Conference, 8:15 P.M.* Guest to be announced.
January	20	Meeting of Section on Labor Law
January	24	Dinner Meeting of Committee on Medical Jurisprudence
January	25	Dinner Meeting of Committee on International Law Meeting of Committee on State Legislation
January	26	Meeting of New York State Bar Association Section on Antitrust Law
January	27	Meeting of New York State Bar Association Section on Food, Drug and Cosmetic Law
January	28	Annual Meeting of New York State Bar Association
January	29	Annual Meeting of New York State Bar Association
January	31	Dinner Meeting of Committee on Aeronautics
February	1	Meeting of Committee on State Legislation
February	2	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
February	3	Meeting of Section on Litigation

February	7	Dinner Meeting of Committee on Federal Legislation *Forum on Jurisdiction over United States Forces Abroad.* Sponsorship Committee on Military Justice Dinner Meeting of Committee on Military Justice Dinner Meeting of Committee on Professional Ethics Dinner Meeting of Committee on Real Property Law
February	8	Dinner Meeting of Committee on City Court Meeting of Committee on State Legislation
February	9	Meeting of Section on Jurisprudence and Comparative Law Dinner Meeting of Committee on Courts of Superior Jurisdiction
February	10	Meeting of Section on Trade Regulation Meeting of Committee on Trade Regulation and Trade Marks
February	14	Meeting of Section on Corporate Law Departments
February	15	Meeting of Committee on State Legislation
February	16	Meeting of Committee on Admissions Meeting of Committee on Arbitration Dinner Meeting of Committee on Bill of Rights Meeting of Section on Corporations Meeting of Committee on Domestic Relations Court Meeting of Committee on Foreign Law *Round Table Conference, 8:15 P.M.* Guest to be announced.
February	17	Meeting of Section on Taxation
February	21	Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations Meeting of Library Committee
February	23	Meeting of Committee on State Legislation
February	25	Dinner Meeting of Committee on International Law

Justice in a New State

By The Honorable Shneour Zalman Cheshin
Deputy President of the Supreme Court of Israel

Four cases involving points of constitutional law of the greatest importance have recently come before the Supreme Court of Israel. The facts of the first case were briefly as follows.

According to our Press Law, the Minister of the Interior is authorized to suspend publication of a newspaper which publishes material likely to undermine the security of the State or endanger the peace of the inhabitants, but he must specify in his order the term of suspension.

Not so very long ago two newspapers, one Arabic and one Hebrew, severely criticized the foreign policy of our Government. The Minister of the Interior used his authority to suspend the publication of these two newspapers for a number of weeks.

They then applied to the Supreme Court sitting as a High Court of Justice for an order nisi in the nature of a writ of mandamus directing the Minister of the Interior to appear before the Court and show cause why he should not cancel his order of suspension. Thus arose the issue of the Freedom of the Press involving, as it does, human rights and civil liberties.

Case number two involved an Israeli Arab who was apprehended by a Military Commander and kept in prison. His whereabouts were not made known either to his family or to the civil authorities. Attorneys tried in vain to see him, to locate him and to get information from him as to the reason of his apprehension. All their attempts were unsuccessful. His family therefore applied to the Supreme Court of Israel sitting as a High Court of Justice for a writ of habeus corpus—an order directing the jailers to appear in court and to show cause why they kept him without warrant of arrest and without bringing him to trial, and why he should not be released forthwith.

Editor's Note: This paper is an adaptation of lectures delivered by Judge Cheshin before the Association, the America-Israel Society and the Foreign Law Association.

Case number three also involves an Israeli Arab who, at the age of 62, although he was already married and the father of five children, fell in love with a girl of 20 and wanted to marry her. He appeared before the Kadi, who is the religious dignitary, or priest, of the Moslems, and asked him to perform the wedding ceremony, offering proof that he had purchased the girl from her father and paid a high price, and was, therefore, entitled to marry her. He also pointed out that Moslem religious law provides that a man may marry more than one wife.

The Kadi, however, refused to perform the ceremony, saying that the days have passed when a man may marry as many wives as he wishes. Israel, he explained, now has a law providing equal rights for man and woman and, in view of the fact that a woman may not have more than one husband, it follows that a man should have only one wife. And so the Kadi refused to perform the ceremony.

The elderly suitor then appealed to the Supreme Court of Israel sitting as a High Court of Justice. He complained that his right to freedom of worship was being infringed and he asked for an order directing the Kadi to perform the ceremony.

Case Number four had to do with a teacher who was discharged from his job, because of his political inclinations, by the Director of Education on the command of the Minister of Defense. It had transpired that before the establishment of the State of Israel this teacher had been the leading spirit in one of the underground movements and that he had not abandoned his revolutionary tenets and inclinations.

He, too, resorted to the Supreme Court sitting as a High Court of Justice, asking for an order directing the Director of Education to cancel his dismissal and to reinstate him in his position.

THE STRUCTURE OF GOVERNMENT

Before revealing what the decisions of the Court were in these four cases, I think it worthwhile to explain, at least sketchily, the structure of the Government of Israel, including that of the

judicial system, so as to make clear why these cases were brought to the Supreme Court sitting as a High Court of Justice.

As nearly everyone knows, Israel is a part of an area long known as Palestine. Up to the end of World War I, Palestine itself was part of the Turkish Empire and consequently lived under Turkish Law. Then, for a period of 30 years, the British, under a Mandate from the League of Nations to administer the area and to establish in it a Jewish National Home, carried on the governmental functions.

On the 14th of May, 1948, when Israel was established as a State in accordance with a resolution adopted by the General Assembly of the United Nations some six months before, Israelis faced a very interesting and vital practical problem, a problem such as the Americans faced soon after they declared the independence of the Colonies from Great Britain, namely, what law should be administered in the new State? Should it be entirely new law? Should it continue to be the law administered in Palestine theretofore, a law mainly based on English Law and Jurisprudence?

The Mandatory Regime, during its 30 years of existence, did indeed do a remarkable job in the field of legislation whatever may have been the record in other aspects of governmental action. It must be admitted that a large body of law was enacted which not only was appropriate to the development of a progressive community in Palestine but was, in large part, adapted to its needs at the time. Should this body of law be thrown overboard or should it be kept intact and acted upon?

We have adopted the very same solution that the ancestors of Americans of today adopted after they severed political, economic and, to a degree, intellectual ties with the mother country.

Immediately upon the establishment of the State of Israel, there was created a Council of State of 37 members and from these 13 were selected to form a Provisional Government. They enacted the first fundamental law of the new Nation only a few days after the signing of the Declaration of Independence. To understand the spirit of this very important act, it will help to

refer to a few sentences of that Declaration, part of the articles of faith of the founders of the State of Israel and its inhabitants.

The Proclamation of Independence says that "the State of Israel... will be based on Freedom, Justice and Peace as envisaged by the Prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations."

These were the articles of faith of the founders of the State of Israel. It was contemplated to have them implemented in a constitution, in a basic law of the land or in subsidiary legislation. Yet the full flowering of these precepts could not occur in a moment. Israel has been engaged, during the past six years, in a struggle for survival, and a struggle to make a home for hundreds of thousands of Jewish immigrants who have come from all parts of the world—the remnants of the Nazi victims who are living witnesses to the denial of every human right in so many countries.

SOURCES OF THE LAW

A few days after the establishment of the State of Israel and the proclamation of our independence, a law, called the Law and Administration Ordinance, was enacted. This law prescribes how the government shall be carried on. It says, most importantly, that the Law of Palestine, as it existed on the eve of the termination of the Mandate— the 14th of May, 1948—shall remain the Law of Israel, insofar as there is nothing therein repugnant to the said Ordinance or to the other laws which may be enacted by the Provisional Council of State, and subject to such modifications as may result from the establishment of the State.

Now, what was this law that we inherited at the outset? It had a number of sources and these are worth examining, for they help to give us an understanding of many of the problems which mem-

bers of the Bench and Bar, litigants and legislators, have encountered and still meet.

There are, of course, the remnants of the Turkish law that was administered in Palestine, including what is now Israel, before the British occupation. This law is far from modern or suited to a progressive and intellectual community. Yet parts of it were and still are in force in Israel.

Much of the Turkish law was based on Moslem religious rules. These do not recognize locomotives, steam trolleys or electrically driven vehicles but they do have a good deal to say about donkeys, camels, cows and horses. The entire law of Torts, moreover, is concerned with damage done by these animals. A few examples are illuminating:

"If dirt and mud are scattered about by the hoofs of an animal and another person's clothes are splashed therewith; or if such animal kicks with his hind legs or swishes his tail and inflicts injury thereby, there is no need to make good the loss. But a person riding an animal is responsible for collision or for blows inflicted by the front feet or by the head."

(Of course this point of view is nothing to joke about or laugh at. This was the law of a community of yesterday. It was appropriate for its time. It is no longer appropriate for the State of Israel or for any other modern society. I cite it to illustrate the problems with which our first legislators were faced in the new State. The intricate problems of the collisions of cars were unknown in such rules because the Prophet Mohammed didn't know about automobiles; they had not yet been invented in his day.)

"If any person drags the clothes of another person and tears them, he must make good the loss and pay the full value thereof. If a person, however, takes hold of the clothes of another, and the owner of such clothes draws them away and, by so doing tears them, such person is liable to make good only one-half the value of the garment. Similarly, if any person sits upon the skirt of another, and the owner, unaware thereof, gets up, and tears his clothes, such person must make good one-half the value of the clothes."

This is the notion of sharing the loss. "The owner of a pearl worth 50 piastres drops it and it is swallowed by a hen worth 5 piastres, the owner of the pearl may take the hen upon the payment of 5 piastres."

Let us see one or two examples of the law providing for neighborly relations.

"If a person climbs up the fruit trees in his garden, and thereby overlooks the women's quarters of his neighbor, such a person must give information every time he intends to climb such trees in order that the women may cover themselves. Should he fail to give such information, the court may forthwith prohibit him from climbing such tree . . ."

(This stems, of course, from the Moslem requirement that women must cover their faces. A violation of the above rule is considered to amount to injury. The old Turkish law even went so far as to require a householder to build a wall before a newly constructed window, overlooking a place where women of an adjoining neighbor foregather with uncovered faces.)

The regard for women can also be seen from the following provision in the law of evidence: "In civil cases evidence is only valid when given by two males, or by one male and two females."

(Here is reflected the social status of women under the old Turkish rule in provisions that have now become obsolete under the Women's Equal Rights Law of 1951.)

It would be possible to cite many other examples of the rules of law that arose out of social conditions of another age. Those I have mentioned, however, serve to show something of the provisions of the Turkish law with which we have had to deal.

The Law and Administration Ordinance, mentioned earlier, provided as a source of Law also the many important enactments, dealing with all areas of human endeavor, that were made by the British during their 30 years of administration as the Mandatory Power.

A third source of Law is the provision enacted at the time by the Mandatory Government that any gap which may be found in the laws taken over from the Turkish Administration shall be

filled by the Common Law of England and the principles of Equity. This is important to keep in mind, for much of the Common Law is still applied in Israel in spite of the fact that we have severed all ties with Great Britain.

The Courts in Israel function, of course, against the background of the other organs of government, as well as against that of the sources of Law. Our Knesseth, or Parliament, is composed of a single chamber of 120 members elected according to a system of proportional representation. The Presiding Officer, or the Speaker, is elected by the members from among their number. Bills are handled by committees and are enacted only after three readings with ample opportunity for argument, debate and amendment.

The President of Israel also is elected by secret ballot of the Members of the Knesseth. In his selection there are no limitations as to sex or religion. He may be a man or woman, a Moslem, a Christian or a Jew. The duties and the powers of the President of the State, however, are restricted; he charges one of the Members of the Knesseth to form a Government, appoints foreign representatives, receives foreign diplomats and accepts the reports of the Prime Minister as occasion demands.

The Prime Minister is the focal point of governmental structure as he is in Great Britain. He presides over meetings of the Cabinet, acts as the Government's chief spokesman and, in effect, is the chief executive officer of the State.

Certainly one of the most distinctive aspects of the governmental structure of Israel is its judicial system because of the novel method that has been adopted for the selection of judges from the lowest bench to the highest. This method has been devised to remove the pressures of politics from their selection and yet to obtain the benefit of the best-qualified opinion.

Under the Israel Plan judges are appointed by the President of the State on the recommendation of a nine-member Appointments Committee made up of three judges of the Supreme Court (including its President), the Minister of Justice and another Member of the Cabinet, two Members of the Knesseth who are

chosen by the full membership, and two members of the Bar, designated by the Council of the Israel Bar Association to serve on the Committee for a period of three years. The President of the State must honor the recommendation of this Committee. All judges are appointed for life or until reaching the pensionable age of 70 when they must retire. They can be removed from office only for misbehaviour after a hearing by a specially constituted committee.

As might be expected, the Magistrates' Courts have the most limited jurisdiction, both in civil and criminal cases. They number about 20 in all and are established in nearly every town and village of importance so as to be accessible to the people.

Appeals from the Magistrates' Courts go to the District Courts, the second level of our judicial system. There are three District Courts, one in Jerusalem, one in Tel Aviv and one in Haifa. The one in Haifa goes on circuit to Safad and Nazareth in Galilee; the one in Jerusalem to Beersheba.

On the highest level, of course, is the Supreme Court. It holds its sessions in Jerusalem, the capital of Israel. The Supreme Court has nine judges who sit in groups of at least three. It hears appeals, both civil and criminal, from judgments of the District Courts in the exercise of appellate jurisdiction. The Supreme Court also has original jurisdiction and as a High Court of Justice hears applications that come from various quarters, often from the minority groups in Israel or from individuals who feel that their civil liberties or rights have been infringed by the Government or one of its departments. The Supreme Court as a High Court of Justice sits in cases involving habeas corpus, mandamus, quo warranto and certiorari—the four prerogative writs.

When the Supreme Court of Israel sits as a High Court of Justice, it does so to safeguard the interests and rights of the individual. That is why, in one of the cases mentioned earlier, a writ of habeas corpus was required and, in another, a writ of mandamus. The Court had to consider in those cases whether the civil liberties of the individuals concerned had been infringed.

THE SUPREME COURT DECIDES

We have now come, by a rather circuitous route but perhaps a useful one, to an appropriate point to examine the opinions laid down by the Supreme Court in our four cases.

In the first case, that of the newspaper publisher, who came alleging infringement of the Freedom of the Press, the Court said:

"The principle of free expression is a principle closely connected with the process of a democratic government. Under an autocratic regime the ruler is regarded as a Superman and as one who knows best what is good and what is bad for his subjects. It is, therefore, prohibited to criticize in public the political actions of such ruler. In a democratic country, on the other hand, the rulers are only the representatives of the people who elected them. Every individual may, therefore, criticize the political actions of the elected representatives at any time, whether with a view to having them amend their action or in order to cause their immediate resignation and their replacement at election time."

The gist of this is clear, but here the court also relied upon three authorities, one British and two American.

The British authority, Scrutton, J., in a famous opinion of his said that, "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong or even dangerous." Otherwise there is no freedom of the press and no freedom of speech.

In a very famous case, Schenk v. The United States, Justice Holmes said:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and no court could regard them as protected by any constitutional right."

Meaning thereby that in time of peace everyone may criticize the government even though his criticism may be severe and harsh.

The following are the words of Justice Brandeis, also from a very famous case, the case of Whitney v. People of the State of California:

> "Those who won our independence believe that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . Only an emergency can justify repression (of free expression). Such must be the rule if authority is to be reconciled to freedom."

These were the words that Justice Brandeis used, and these were the very words upon which the Supreme Court of Israel based its decision, not because it was bound by this authority but because of its persuasive argument.

After analyzing the two articles that were published in the two newspapers in the Hebrew and Arab press, the Court came to the conclusion that even though they may be subversive, they did not tend to undermine the security of the country and did not endanger the peace of the public. Therefore, the Court ordered the Minister of Interior to cancel his order of suspension and to allow these newspapers to resume their publication.

Mind you, the State of Israel is still in a state of emergency at the present time. There are border incidents every day and every night. Some claim that technically we are still in a state of war, and the Supreme Court of Israel dares at such a time to say that, in spite of all of that, human rights must be protected and the civil liberties cannot be infringed even in time of emergency.

In the second case, that of the Arab who was detained without trial, without the chance of being able to see an advocate, I should now like to say that we did not have enough time to enshrine all of the articles of faith of our proclamation of independence into positive law. Our statutes have not been revised entirely and, therefore, we still have remnants of the British Emergency Regulations. These emergency regulations say, in a notable section, known as Section 111, that the Military Com-

mander may detain any person without trial if he thinks that his activities are dangerous and detrimental to the State. However, the very same regulation provides that there shall be a committee appointed by the Minister of Defense to which such a detainee may bring his objections. This Committee sits in a quasi-judicial capacity. It has no great powers but, nevertheless, it at least gives the detainee somebody to resort to.

The Supreme Court, after hearing both sides of the story, found that this man had been detained without trial and without warrant of arrest and that no Committee had been set up before he was detained, but only after the event. Thus a very important question arose as to the legality of the order of detention because at the time it was made, the detainee had no remedy. This is what the Court had to say:

"In time of war authorities may deem it expedient in certain cases not to announce the reason for detention or the place of detention. However, in the absence of an explanation shedding light on the subject, one cannot avoid the impression that there are officials who do not yet grasp the idea that the attorney who defends the interests of his client is also rendering a valuable service to the State by helping to preserve the most fundamental rights of the subject; and it is the duty of the authorities to give him all possible help, and not to hinder him or thwart his efforts by repeatedly telling him, 'Go and come back.'"

That was as to the question why no advocates were permitted to see the man under detention. As to the merits of the case, the Court said:

"Regulation 111 makes provisions which must be accepted so long as the state of emergency requires them and which ordinarily would have been declared unreasonable because they are incompatible with the ordinary rights of the individual. . . . Some slight relief was afforded to a subject who has been so detained by imposing upon the authorities the duty to establish, for the purpose of that regulation, a committee the functions of which shall be to consider any objection that a detainee might find it necessary to raise and to make its recommendations to the Military Commander. . . . It is entirely immaterial that this right of the detainee is so slender. On the contrary, if as against the immense power vested in the Military Commander, the detainee is granted so small a protection, it must be assumed that the intention of the legislature was that at least this right should be closely and carefully guarded. . . . This right is vested in the detainee from the very

minute an order of detention was made against him and when a Military Commander makes use of this extraordinary power he is in duty bound to notify the detainee at once that he is being detained by virtue of Regulation 111 in order to enable him to exercise forthwith his right to appeal to the Committee. But in order that he may do so there must be a committee in existence at the time of his detention. It follows, therefore, that the Military Commander may exercise his power to make the order only if and when there is a committee in existence, and since the order in this case was made before the Committee was established, the Court holds that the very exercise of the powers under the regulations was illegal."

Consequently an immediate order was issued for the release of the detainee. The Court further observed that the authorities are amenable to the Law just as is an individual.

From the two decisions examined so far, it might be supposed that the Supreme Court, sitting as a High Court of Justice, always renders decisions against the Government, but that would be leaping at conclusions indeed.

When the elderly and married Arab suitor appealed to the Supreme Court sitting as a High Court of Justice, he contended that his right of freedom of worship had been infringed by the refusal of the Kadi to perform the marriage ceremony.

The Supreme Court looked into the matter and found a case that had been adjudicated in the United States and which appeared almost analogous to this one. This case—Reynolds v. The United States—involved a Mormon who was convicted of multiple marriage when Utah was a Territory under an act of Congress of 1862, prohibiting plurality marriages in the Territories of the United States. He appealed to the United States Supreme Court on the contention that the said Act of Congress was unconstitutional and that he was being deprived of his rights under the First Amendment which guarantees freedom of worship. Furthermore, he argued that, according to the Mormon Faith, it was mandatory upon him to marry more than one wife. The United States Supreme Court did not accept his contention.

In the case of the elderly suitor we decided that had the Moslem Religion actually commanded a man to marry more than one wife, then any act by the State of Israel preventing him from

doing so would have been an infringement of his constitutional or religious rights. All the Moslem Religion says, however, is "we permit you, we will not interfere." That is only permissive and not mandatory. A law that runs counter merely to permission does not infringe the rights of the individual. Therefore, we threw the case out of court.

Finally, in the case of the teacher who was discharged because of his political inclinations and tendencies, on the recommendation of the Minister of Defense to the Director of Education, this is what the Supreme Court said:

> "Without in any way disparaging the honor and dignity of the Minister of Defense, and no one in this country treats lightly the heavy burden and the great responsibilities that are cast upon him, matters of education do not come within his jurisdiction. For these purposes a Director of Education has been appointed, and, although he may consult with other officials and departments as to the course to be pursued by him, he may not act as an instrument in the hands of others in matters falling within the purview of his office. Whenever the authorities act in a manner affecting the rights of the individual it is incumbent upon them to show that the law authorizes them so to do.
>
> "No evidence has been adduced that applicant advocates the use of force or revolutionary force. The instruction or order issued by the Minister of Defense to the Director of Education not to engage the applicant as a teacher was illegal, and, therefore, of no effect."

The Director of Education, the Court added, did have the authority to dismiss the teacher but he acted, in this case, not upon his own judgment but upon the recommendation and command of some other officer. In other words his judgment was arbitrary, for he did not have the proper state of mind in which to exercise his own best judgment. The Supreme Court therefore ordered the cancellation of the order of the discharge.

THE LAW STRENGTHENS CIVIL RIGHTS

I have tried to explain that the evolution of the law in Israel has tended toward the strengthening of civil rights for all, even under the most adverse, precarious and serious circumstances resulting from a state of war.

This is the trend and we hope it will continue. For the Law of Israel is not a dead letter; it is a living law. It does not stand still. The supremacy of the Law, the rule of Law, is by no means a novel doctrine in the United States of America. Even children in the home know of it. Unfortunately, it is not generally so in our part of the world.

I have tried to explain the workings of the various organs of state, more particularly the judiciary. In our neighboring States the judiciary is a servant of some other organ of the State. The judiciary is in the hands of a cabinet and the cabinet is in the hands of an army.

In the State of Israel it is the other way around. The army is controlled by the Government and the Government complies with the Law as interpreted when necessary by the Supreme Court sitting as a High Court of Justice. These are fundamentals of a free democracy.

Israel is a bastion of democracy in the Middle East. There is no reason why it should ever cease to be so. We hope that with the help of the free democracies of the world we shall be able to implement all the articles of faith that were laid down in our Declaration of Independence.

Recent Decisions of the United States Supreme Court

By Joseph Barbash and Robert B. von Mehren

MARION L. HOLLAND, ET AL. V. UNITED STATES

(December 6, 1954)

For two decades the Government has been securing convictions in tax fraud cases through reliance upon the "net worth method of proof," i.e. by showing that the accused's assets have increased so substantially over a given period of time that an inference of tax evasion is justified. In 1943 the Supreme Court sanctioned the use of this method as applied to a taxpayer who had no records. *United States* v. *Johnson*, 319 U.S. 503. During the October 1953 Term the Court granted certiorari in four net worth cases—the *Holland, Friedberg, Smith* and *Calderon* cases. In the opinion in the *Holland* case, it was noted that certiorari in many prior cases had been denied "because the cases involved only questions of evidence and, in isolation, presented no important questions of law." In recent years, however, the number of petitions for certiorari involving the net worth theory have increased. The Court, therefore, re-examined the problem and concluded that certiorari should be granted in the *Holland* case and its companions because it appeared that the net worth theory "involved something more than the ordinary use of circumstantial evidence in the usual criminal case." It has a bearing on the "safeguards traditionally provided in the administration of criminal justice."

Decisions in the four net worth cases in which certiorari had been granted were handed down on December 6, 1954 and in all the Government prevailed. In each case Mr. Justice Clark wrote for a unanimous court.

The *Holland* case presented a full analysis of the general problem and was relied upon in the other three decisions. The Hollands, husband and wife, were convicted of attempting to evade their 1948 income taxes. They had been indicted in three counts relating respectively to the tax years 1946, 1947 and 1948. The jury acquitted with respect to 1946 and 1947. At the trial the Government presented evidence showing that the Hollands' net worth at the opening of the indictment period, January 1, 1946, was about $19,000 and that by the end of the indictment period, December 31, 1948, it had apparently increased to approximately $152,000. During 1948, the evidence tended to show that the petitioners' net worth increased by $32,000, while they reported less than $11,000 taxable income for that year.

The Hollands presented to the Supreme Court several grounds for reversal of their convictions. First, they argued that the net worth theory should be applied only to taxpayers who kept no books, as in the *Johnson* case, and was inapplicable in their case because they had kept books. This

contention was rejected: "To protect the revenue from those who do not 'render true accounts,' the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history."

They next argued that to apply the net worth theory the Government must establish, with reasonable certainty, an opening net worth. The Supreme Court agreed. However, upon a review of all the facts, the Court found that the Government had met this test. This conclusion was reached even though the Government had not fully investigated all of the leads furnished by the defendants indicating a greater opening net worth than that alleged by the Government. The Court said that, when the Government fails to show an investigation into the validity of relevant leads which are susceptible of check and which, if true, would establish the taxpayer's innocence, "the trial judge may consider them as true and the Government's case insufficient to go to the jury." Here, however, the Government had investigated the important leads supplied by the defendants and had made a detailed investigation of their lives covering several states and a score of years. Moreover, even if the leads which the Government had not followed were assumed to be true, "the Government's evidence was sufficient to convict."

It was then urged by the Hollands that the Government had failed to negate every possible source of non-taxable income during 1948. The Court agreed that net worth increases must be attributable to taxable income. However, it is not the Government's duty, the Court said, to negate *all* possible sources of the alleged net worth increase—gifts, loans, inheritances, etc. The Government need only prove "a likely source, from which the jury could reasonably find that the net worth increases sprang." Presumably, if the jury believes that the source suggested by the Government is the true source, the other non-taxable sources suggested by the defendant will have been negated.

Finally, the Hollands argued that the Government had failed to prove "wilfulness." The Court agreed that wilfulness, i.e., a specific intent not inferable merely from the understatement of income, is an essential element of the crime. However, the jury could have found wilfulness from the evidence that these defendants had consistently under-reported large amounts of income and had also failed to state all of their income in their books and records.

As far as results are concerned, the four net worth cases decided by the Supreme Court on December 6, 1954 were complete victories for the Government. Nevertheless, the Court was careful to point out the flaws inherent in the theory, stating that it was "so fraught with danger for the innocent that the courts must closely scrutinize its use."

The net worth theory rests, the Court indicates, upon two basic assumptions: (1) that most assets derive from taxable sources and (2) that when this is not true, the taxpayer is in a position to explain the discrepancy. While these basic assumptions are generally sound, the Court intimates that they

may be inapplicable in individual cases. Therefore, the Supreme Court admonishes the lower courts to use the net worth theory with:

> "... great care and restraint.... Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

The Court's admonition to restraint may, however, offer only chimerical protection to defendants. The logical difficulties pointed out by the Supreme Court are probably more troubling to lawyers than to laymen. In the jury room the Government's mathematical demonstrations may well overcome the cautions contained in the judge's charge.

It is unlikely that the Supreme Court would sanction the use of theories analogous to the net worth theory in criminal cases other than those involving tax evasion. The choice presented to the Court by the *Holland* case was a most difficult one because without the net worth theory it seems likely that many tax evaders would escape punishment. However, the choice made by the Court will undoubtedly make it easier for the Government to secure convictions—of the innocent as well as the guilty. Taxpayers deriving large amounts of income from non-taxable sources will be well advised to keep full records.

WATSON, ET UX. V. EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

(December 6, 1954)

Mr. and Mrs. Watson, Louisiana citizens, brought an action in the Louisiana courts against Employers, a British liability insurance company. They alleged that Mrs. Watson had been injured in Louisiana as the result of using a dangerous Toni home permanent, manufactured by the Toni division of the Gillette Safety Razor Company (a Delaware corporation based in Massachusetts), which carried a liability policy with Employers. A clause in the insurance contract, which had been issued in Massachusetts and delivered in Illinois, provided specifically that no action might be brought against Employers until after a final judgment had been entered against Gillette or there had been a settlement agreed to by Employers. The Louisiana insurance code provided, however, that despite such clauses, an action might be brought directly and immediately against the insurance company if the injury occurred in Louisiana. In addition, Employers had filed a consent to such direct suits in order to meet a Louisiana statutory requirement for a certificate to do business in Louisiana.

The United States District Court, to which the action had been removed, dismissed the case, holding:

> (1) the code provision unconstitutional under the Due Process Clause of the Constitution as applied to a policy written and delivered outside Louisiana; and
>
> (2) the consent ineffective as having been unconstitutionally exacted

107 F. Supp. 494. The Court of Appeals for the 5th Circuit affirmed. 202 F. 2d 407.

On appeal the Supreme Court unanimously reversed. Mr. Justice Black wrote for the Court and Mr. Justice Frankfurter filed a concurring opinion.

Distinguishing prior cases where forum states had been forbidden to alter the terms of insurance contracts with which they had no contacts or "slight" contacts, the Court held that here the Due Process Clause had not been violated. Louisiana might well have to care for persons injured within the state and thus had a substantial interest in providing such persons with an opportunity to bring suits in a convenient forum. To protect its interest, Louisiana could legislate to affect the Gillette-Employers contract. That contract was not simply a local contract, for its purpose was to protect Gillette against damages on account of injuries that might be suffered anywhere, including Louisiana.

For the same reasons, the Court rejected the argument that the Full Faith and Credit Clause required Louisiana to honor the contract laws of Massachusetts. Where "a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies," and "plainly" the interests of Massachusetts "cannot outweigh the interests of Louisiana in taking care of those injured in Louisiana."

Because the Court held valid the Louisiana statute regardless of consent, it followed that the consent was validly exacted. As the condition itself was constitutional, there was no possible question of consent to an unconstitutional condition.

By grounding the result on Employers' consent to direct suit in Louisiana, Mr. Justice Frankfurter would avoid the specific Due Process and Full Faith and Credit questions decided by the Court. He feels that these are difficult questions that cannot be solved solely by finding an interest of Louisiana in protecting persons injured in Louisiana. This interest must be balanced against the interest of Massachusetts in protecting the parties to its contracts. As the majority's road leads to "the delicate problem of balancing interests—that refractory aspect of due process," an easier path should be chosen, if one is available.

Justice Frankfurter finds that easier path in Employers' consent to direct suit. That consent is dispositive unless its exaction was beyond the constitutional power of Louisiana. After quoting from a series of opinions dealing with the question of unconstitutional conditions—the requirements a state

may *not* impose as a condition of admitting a foreign corporation—he would hold that, so long as there is no interference with interstate commerce or Federal governmental operations, and no discrimination in favor of domestic companies, the test of constitutionality is one of "reasonableness" in the "light of all relevant factors." That test has been met here because:

> "The conditions imposed are fairly related to the interests which Louisiana may appropriately protect in surrendering its right to exclude a foreign corporation. The interest of Massachusetts or Illinois do not so obviously subordinate those of Louisiana that the latter must constitutionally yield to the former."

It was reasonable for Louisiana to require as the "price of its permission to Employers to tap the Louisiana insurance market," a condition aimed at the difficulties encountered by persons injured in Louisiana in obtaining jurisdiction over out-of-state tort-feasors. Louisiana was not, moreover, "selfishly or ruthlessly seeking to inject itself into matters that were the sole or predominant concern of sister states."

Mr. Justice Frankfurter is probably right in his contention that the majority has taken a long step in permitting individual states to disregard the interests of other states in protecting their own interests. While it may well be that Massachusetts does not care about the enforceability of the contract restriction involved here, even though it would enforce it, the majority would seem to consider irrelevant even an affirmative policy of Massachusetts, provided that (a) Louisiana had a legitimate interest and (b) it was reasonably foreseeable that the contract would affect persons in other states.

On the other hand, even Justice Frankfurter would seem ready to plunge for these plaintiffs. His instant application of the doctrine of unconstitutional conditions would permit the same result as the majority's in the same cases so long as the insurance company had consented to direct suit. The condition imposed by a state as the price of entry apparently need not relate to the business done by the foreign corporation in the state. Here the business done by Employers in Louisiana had no relation to the injury to Mrs. Watson, to the insurance contract between Gillette and Employers, or, so far as appears, to the ability of the plaintiffs to serve process on either Gillette or Employers.

Recent Decisions of the New York Court of Appeals

By Sheldon Oliensis and Joseph H. Flom

WOOD V. O'GRADY

(307 N.Y. 532, *Oct. 22, 1954*)

The Court of Appeals, dividing 4 to 3 and writing four opinions, has handed down an important decision upholding the legality of peaceful organizational picketing. In so doing, the Court reversed a unanimous judgment of the Appellate Division, First Department, which had granted an injunction against such picketing, and reinstated the judgment of Special Term dismissing the complaint.

Plaintiff in the action was the proprietor of a retail liquor store which employed three sales clerks. In October, 1951, the union tried to organize the clerks, but none joined, nor had any joined at the time of trial. On October 20, 1951, picketing of the employer's store began and continued until an injunction was issued by the Appellate Division in November, 1953.

Section 876-a of the Civil Practice Act (the "little Norris-La Guardia Act") prohibits the issuance of injunctions in cases involving a labor dispute, except after a finding that unlawful acts have been threatened or committed causing substantial and irreparable injury to the complainant's property.

All members of the Court were apparently in agreement that if the picketing was for the purpose of pressuring the employer to compel his employees to join the union (which would have constituted a violation of the New York Labor Law by the employer), the picketing could have been enjoined, because of its unlawful objective. The majority held, however, that the purpose of the picketing was merely to persuade the employees and was therefore legitimate and unenjoinable.

The majority noted that there was evidence in the record that the employer threatened to dismiss any employees who joined the union and that at least one employee, favorable to joining the union, refrained from doing so, expressing the fear that his job would be jeopardized. The majority also noted that the employer did not attempt to prove any loss of patronage or business profits and had therefore failed to establish the "substantial and irreparable injury" prerequisite to an injunction.

The Court briefly distinguished the cases relied upon by the Appellate Division, pointing out that in this case there had been no violence or untruthful representations, nor had the union sought to compel the employer to recognize the union or to enter into a collective bargaining contract.

The two years of constant picketing, continued despite the failure of any employee to join the union, had been stressed by the Appellate Division as

in the nature of unlawful economic coercion of the employer. The majority of the Court of Appeals considered this factor irrelevant. The test of illegality, the majority held, was not whether any particular picketing had "gone on long enough" but whether the picketing was being lawfully conducted in the furtherance of union interests in a statutory labor dispute.

The two concurrences are particularly important in view of the narrow division of the Court. Judge Desmond assumed, arguendo, that continuance of the picketing after the failure of the clerks to join might without more be adequate proof that the real purpose of the union was illegal: to force the employer to compel the employees to join the union. But, Judge Desmond stated, the record contained undisputed evidence that the employer coerced the employees not to join the union. The picketing was therefore in aid of the employees' constitutional and statutory rights to make their own unimpeded choice as to whether or not to be organized. Judge Desmond also felt that the failure of proof of any substantial injury to the employer justified denial of the injunction.

Judge Fuld also concurred, stating that the weight of the evidence strongly supported the conclusion that the picketing was for the legitimate purpose of persuading the employees to become members of the union.

Judge Van Voorhis dissented in a long opinion in which Chief Judge Lewis and Judge Conway concurred. Since, as held by the Appellate Division, the employees were unwilling to be represented by the union, there was no "labor dispute" to invoke the provisions of Section 876-a of the Civil Practice Act. Prior to commencing the action, the employer had petitioned the New York State Labor Relations Board for an election to determine whether the union was an authorized bargaining agent. This petition was dismissed for the reason that the union had not claimed to and did not represent the employees and was merely engaged in an organizational activity. The employer was therefore now confronted with the alternatives of either going out of business or illegally compelling his employers to sign up with a union which they did not want to join.

The dissenters argued that prior decisions sustaining peaceful organizational picketing were no longer applicable. These decisions had upheld the right of a union to exert economic pressure on an employer to force his employees to join a union. However, this right was sustained as helping to counteract weapons in the employer's arsenal, such as his unrestricted right to hire and fire and to exclude union men entirely. Since the employer is now denied the use of these weapons, the union's use of the counteracting weapon is no longer justified.

Judge Van Voorhis also pointed out certain activities of the union which indicated that it was seeking to apply pressure to the employer rather than the employees, such as the picketing for a time of the warehouses through which the employer was supplied. The avowed object of the picketing was to disrupt the employer's business and to prevent customers from patronizing his store. The law cannot reasonably be construed, the dissenters felt, as offering the employer the alternative of permitting disruption of his business or illegally coercing his employees to organize.

The decision brings into sharp focus the problems inherent in organizational picketing and the conflicting resolutions of these problems which may reasonably be arrived at. Even where picketing is being conducted solely to induce employees to join a union, the employer inevitably suffers economic loss. It provides such an employer with relatively little comfort to advise him that the economic injury inflicted upon him is an inevitable cost of the collective bargaining process and the democratic solution of labor controversy.

However, the natural sympathy for the employer as the injured innocent disappears when the employer fails to demonstrate any substantial injury to himself and, particularly, where he exerts counterpressure upon his employees to discourage their joining the union. These factors would seem to have weighed heavily in the instant decision.

It was implicit in the majority opinion and explicit in Judge Desmond's concurrence that, despite the two years of continued picketing, the employees, because of employer pressure, had never had a free opportunity to make an "unimpeded choice." At least until such free choice had been exercised, it would seem that peaceful organizational picketing could not be enjoined. From the majority opinions, it would appear that the Court might go further and permit indefinite peaceful organizational picketing, in the absence of evidence that the union's purpose was to compel the employer to force his employees to organize.

The dissenters, on the other hand, would apparently outlaw all organizational picketing. The dissent expressly says that it was "not necessary to decide in this case whether there may be some circumstances under which organizational picketing is still lawful, but in no event can the law reasonably be construed as allowing an employer's business to be injured or destroyed when there is nothing which he can do to alleviate the economic pressure except by violating the law." Since organizational picketing, whatever its motive, always confronts the employer with this dilemma, it is difficult to see under what circumstances the dissenters would consider it as justified.

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"How thankful I should be to fate if I could find but one path which generations after me might be trodden by fellow members of my species. And how infinitely grateful I should be if in my life's work, I could find one small "up current" which might lift some other scientist to a point from which he could see a little further than I do."

KONRAD Z. LORENZ
King Solomon's Ring, N.Y. 1952.

What are the methods and techniques used by the poet and the legal draftsman in their art of communication. In a recent stimulating volume entitled "It's Your Law,"[1] the author has made a detailed study of the similarities and the differences employed in their use of words. "A legal document deputizes as well as decides. A poem elicits as well as expresses a meaning." Only the good poet manipulates words more tenderly and more ruthlessly than the lawyer drafting a legal document.

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